



U.S. CHAMBER  
Institute for Legal Reform

U.S. CHAMBER OF COMMERCE

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September 24, 2014

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act: Rubio's Restaurant Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278

Dear Ms. Dortch:

On behalf of the U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform<sup>1</sup> (collectively referred to as "Chamber"), we respectfully submit these comments to the Federal Communications Commission ("Commission") in response to its Public Notice<sup>2</sup> requesting comment on the Petition for Expedited Declaratory Ruling filed by Rubio's Restaurant, Inc. ("Rubio's Restaurant Petition")<sup>3</sup> in the above-referenced docket.

The Chamber strongly urges the Commission to grant the Rubio's Restaurant Petition because businesses and other organizations need relief from liability under the Telephone Consumer Protection Act ("TCPA") for a prerecorded or autodialed call or automated alerts made to a wireless number for which the caller has obtained valid consent to call but has been reassigned, unbeknownst to the caller, to a new customer. As discussed further below, imposing such liability against businesses for calling reassigned numbers presents enormous compliance challenges for companies and runs counter to the TCPA's

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<sup>1</sup> The U.S. Chamber Institute for Legal Reform seeks to promote civil justice reform through legislative, political, judicial, and educational activities at the global, national, state, and local levels.

<sup>2</sup> Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from Rubio's Restaurant, Inc.*, CG Docket No. 02-278, DA 14-1428 (rel. Aug. 25, 2014).

<sup>3</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act: Rubio's Restaurant, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed August 11, 2014) ("Rubio's Restaurant Petition").

underlying policy objective. Without the requested clarification, there will be no check to TCPA class action litigation, which has become abusive and far removed from protecting everyday consumers from intrusive telemarketing calls.

**I. There is no Practical Way to Avoid Making Calls to Reassigned Telephone Numbers and Exposing Parties to Liability Runs Counter to the TCPA.**

*A. Preventing Calls to Reassigned Numbers is Impractical*

As the U.S. Chamber of Commerce (of which ILR is affiliated) has pointed out in its previous filings, there is no simple fix or solution available for businesses to verify the continued accuracy of mobile phone numbers provided to the company by a customer but reassigned without the knowledge of the caller.

There is little doubt that the sheer volume of mobile phones has increased exponentially over the past several decades. As the Commission itself has acknowledged, “wireless use has expanded tremendously since passage of the TCPA in 1991.” The number of “wireless-only” households increased to 41.0% during the second half of 2013 from 39.4% during the first half of 2013.<sup>4</sup> Indeed, since 2011, there have been more U.S. wireless subscribers than residents.<sup>5</sup> This means there are millions of individual cell phone numbers at any given time in the United States.<sup>6</sup>

It is against this backdrop that many of these cell phone users switch their phone number on a frequent basis for one reason or another. In fact, as many as 37 million telephone numbers are recycled each year by telephone companies.<sup>7</sup> Often consumers do not notify anyone, let alone businesses they previously provided with their contact information, of their changed phone number, nor is there a central database in existence to track the reassignment of numbers from one consumer to another. Even companies that require by contract that a customer updates contact information are finding that they may not have that customer’s most recent telephone number.

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<sup>4</sup> Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat’l Ctr. for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2013*, at 1 (July 2014), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf>

<sup>5</sup> Cecilia Kang, *Number of cell phones exceeds U.S. population: CTIA trade group*, THE WASHINGTON POST, Oct. 11, 2011, [http://www.washingtonpost.com/blogs/post-tech/post/number-of-cell-phones-exceeds-us-population-ctia-trade-group/2011/10/11/gI0ARNcEcL\\_blog.html](http://www.washingtonpost.com/blogs/post-tech/post/number-of-cell-phones-exceeds-us-population-ctia-trade-group/2011/10/11/gI0ARNcEcL_blog.html).

<sup>6</sup> Calculation based on the U.S. Census Bureau’s United States population estimation on July 4, 2013, which was 316,148,990. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, Sept. 22, 2014, <http://www.census.gov/popclock/>.

<sup>7</sup> Alyssa Abkowitz, “Wrong Number? Blame Companies’ Recycling,” *The Wall Street Journal* (Dec. 1, 2011), available at <http://online.wsj.com/news/articles/SB10001424052970204012004577070122687462582>.

To be sure, products marketed as “TCPA solutions,” such as the one offered by Neustar, simply have not demonstrated the capacity to fully protect a company from TCPA violations involving reassigned numbers, even if the company’s systems were compatible with that product.

The Neustar product claims to employ a proprietary phone data repository to attempt to verify that cell phone numbers are still associated with the consumer who provided the telephone number to a company in the first place. However, even without testing the accuracy of Neustar’s advertising claims, it is highly unlikely that this product lacks the ability to ensure the accuracy of all cell phone numbers provided to a company. Indeed, Neustar Vice President of Product Development admitted that the company does not have any information on as many as 30% of wireless numbers.<sup>8</sup>

*B. Exposing Companies to Liability Under These Impractical Circumstances Also Runs Contrary to the TCPA*

Failing to provide the requested clarification would allow litigation to continue that runs counter to the very purpose of the TCPA, which was to protect the privacy interests of everyday consumers. To avoid inadvertently dialing a customer’s phone number—where consent has been obtained—that has been reassigned to someone else, a business or organization would potentially need to verify the subscriber information for each number before placing every autodialed or prerecorded call. Indeed, some have suggested that a live operator should be made to every number to check that it still belongs to a customer before an autodialed call is placed.<sup>9</sup> As such, it would be nonsensical for a statute aimed at reducing unwanted communications to require companies to continually contact their customers with live operators in order to ensure the phone number provided is still assigned to the individual who provided the original consent.

## **II. An Adverse Ruling or Non-Action by the Commission will Only Exacerbate Current TCPA Litigation Abuse**

TCPA litigation has grown exponentially over the past several years and will continue on its current trajectory unless, among other things, the Commission acts favorably on the current and other related pending petitions. At the time the TCPA was created, the bill’s sponsor, Senator Ernest “Fritz” Hollings (D-SC), explained the law was intended to facilitate actions in state small claims courts, which involve smaller sums and do not require (or even allow) the participation of attorneys.<sup>10</sup>

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<sup>8</sup> See *id.*

<sup>9</sup> See, e.g., *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 642 (7th Cir. 2012)

<sup>10</sup> 137 Cong. Rec. 30821-30822 (1991).

But today's TCPA litigation could not be any further from the sponsor's original intent. The defendants dragged into court are no longer just abusive telemarketers the statute was meant to combat; they are businesses small and large spanning a multitude of industries. The number of TCPA cases filed has drastically increased<sup>11</sup> and many of the cases against non-telemarketing companies are large dollar class actions in federal court. To make matters worse, TCPA litigation is now accompanied by abusive tactics pursued by certain members of the trial bar.

One such tactic recently employed by trial lawyers to drum up TCPA business is through an Android app.<sup>12</sup> "Block Calls Get Cash" is being marketed by Lemberg Law who claims the app can help those who download it determine whether they have a claim under the TCPA. The app's website boasts that with "zero cost for the app," and "zero out-of-pocket cost for legal fees," its users will "laugh all the way to the bank." The app allows the law firm to seemingly fish for TCPA cases, and advertisements for the app misinform consumers about the law by stating that *all* "robocalls" to cell phones can generate \$1,500 payouts (when prior consent can exist for such calls).

Even judges across the country are taking note of TCPA litigation abuse. In July, a Florida federal judge publically questioned his previous decision to grant class certification in a junk fax case, stating he was inclined to revisit the issue because it was litigation driven by TCPA lawyers.<sup>13</sup> U.S. District Judge Donald Middlebrooks stated in his opinion that while the named plaintiff on the complaint is C-Mart Inc., the corporate representative's knowledge of the case was relayed by its counsel at the Anderson & Wanca law firm, and he "had no recollection of receiving the [fax] at issue" in the case.<sup>14</sup> "Thus, it appears that C-Mart is serving as a pawn for Anderson & Wanca's class action suit."<sup>15</sup>

A lead plaintiff is supposed to represent the interests of the class, and as Judge Middlebrooks alludes, the plaintiff in some TCPA cases has become merely a figurehead for the law firm to pursue a class action hoping to extract a settlement with large attorney's fees. The same law firm, Anderson & Wanca, was also previously criticized by the Seventh Circuit for engaging in conduct which gave the court "serious pause."<sup>16</sup> This TCPA plaintiffs' firm had used data recovered during a prior suit to send out letters soliciting clients and to then file more than 100 punitive class actions under the TCPA.<sup>17</sup>

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<sup>11</sup> The number of TCPA cases filed increased by 30%, with 160 cases filed in January 2013 to 208 lawsuits filed in January 2014. Jack Gordon, *Debt Collection Litigation & CFPB Complaint Statistics, January 2014*, Interactivecredit.com, Feb. 24, 2014, available at <http://interactivecredit.com/?p=2110>.

<sup>12</sup> See *Block Calls Get Cash*, LEMBERG LAW, 2014, <http://www.blockcallsgetcash.com/>.

<sup>13</sup> *C-Mart Inc. v. Metropolitan Life Insurance Co. et al*, case number 9:13-cv-80561, U.S. District Court for the Southern District of Florida (July 14, 2014).

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Reliable Money Order Inc. v. McKnight Sales Company Inc.*, No. 12-2599 (7 Cir. filed Jan. 9, 2013)

<sup>17</sup> *Id.*

And of course, the Chamber would be remiss if it did not highlight the abusive tactics that prompted the very petition pending now before the Commission. The plaintiff—who received a reassigned phone number that previously belonged to one of Rubio’s Restaurant employees—waited until over 800 messages intended for a Rubio’s employee were received before even contacting the company.<sup>18</sup> A reasonable person in this situation, who was annoyed with receiving unwanted messages, would have contacted the company after a few, maybe even a few dozen alerts. Certainly, safety alert calls to a company’s employee at a number that employee provided were not intended to be subject to such staggering TCPA liability. Waiting to rack up 876 alerts amounting to statutory damages of approximately \$500,000<sup>19</sup> is outlandish behavior and certainly outside the intent Senator Hollings’ vision of the TCPA.

The Commission should act decisively and swiftly to limit these abuses that are stemming from the confusion around the term “called party”. To do otherwise will, at best, preserve the *status quo*, in which companies have no practical way to avoid TCPA lawsuits, and, at worst, encourage more abusive TCPA litigation in this country.

### III. Conclusion

As technology has evolved, so too has the TCPA—into a vehicle for trial lawyers to manipulate ambiguous rules into large dollar settlements that were not intended when the law was conceptualized. In order to remedy the unintended results of today’s TCPA litigation, the Chamber urges the Commission to clarify that calls made with good faith and with valid consent to reassigned numbers do not result in liability under the TCPA. By making the clarifications requested in Rubio’s Restaurant Petition, as well as in the earlier-filed United Healthcare Services Petition, the Commission can help curtail abusive lawsuits and give businesses the certainty they need to continue to provide crucial information for the benefit of consumers and to communicate with their own customers at numbers given for that purpose.

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<sup>18</sup> Rubio’s Restaurant, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 11, 2014) at 3 (“Rubio’s Restaurant Petition”).

<sup>19</sup> *Id.* at 2.

Respectfully Submitted,



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